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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1979

No. 79-1186

Orville E. Dennis,

Petitioner,

vs.

Sidney Sparks and R. L. Lynd, d/b/a Sidney Sparks, Trustee,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

Appeal from the United States Court of Appeals, Fifth Circuit

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INTEREST OF AMICUS CURIAE

The Florida Attorney General requests leave to appear as amicus in these proceedings to represent the concern of the Florida judiciary that the abolition of derivative immunity will inhibit state judicial processes specifically in that qualified individuals will no longer be inclined to accept court appointments due to the potential for personal liability under §42 U.S.C. §1983. This concern is already demonstrated in Adams v. Salfi, et al., Case No. 80-41-Orl-Civ-R filed in the U. S. District Court, Middle District of Florida, Orlando Division, a §1983 lawsuit alleging conspiracy between a judge and a court appointed guardian ad litem. The State of Florida is concerned for the ability of a state court to appoint guardians if such appointees will be exposed to personal liability and subjected to the expense of time and money in defending such alleged conspiracy claims in the course of their court appointed duties.

This amicus curiae brief is respectfully submitted by the State of Florida, by and through its Attorney General, in

support of petitioner, Orville E. Dennis.

ARGUMENT

THE DOCTRINE OF DERIVATIVE IMMUNITY FOR PRIVATE PERSONS SHOULD NOT BE ABOLISHED AT LEAST WITH RESPECT TO A COURT-APPOINTED GUARDIAN AD LITEM.

This Court has repeatedly affirmed the principle that judicial immunity is an absolute prerequisite for an independent judiciary. In Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2897, 57 L.Ed.2d 895 (1978), the court viewed judicial immunity as the sine qua non of an independent judiciary:

> If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose 'that independence without which no judiciary can either be respectable or useful.' Bradley v. Fisher, 13 Wall 335, 20 L.Ed. 646 (1872).

57 L.Ed.2d at 917. Earlier, in Chandler v. Judicial Council, 398 U.S. 74, 84, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970), the court recognized the importance of judicial immunity:

> There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.

The absolute immunity that judges enjoy exists for the benefit of the judicial system and of the public, not for that of the judge. Randall v. Brigham, 74 U.S. 523, 7 Wall 523, 19 L.Ed.2d 285 (1869); Sparks v. Duval County Ranch Co., Inc., 604 F.2d 976 (5th Cir. 1979). The independent administration of justice rests on the principle of judicial immunity. Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Bradley v. Fisher, 80 U.S. 335, 13 Wall 335, 20 L.Ed. 646 (1872). Judicial immunity has been extended to prosecutors for their decisions to prosecute and their conduct of the government's case on the theory that these activities are "intimately associated with the judicial phase of the criminal process . . . ." Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); Spaulding v. Nielson, 599 F.2d 728 (5th Cir. 1979).

The doctrine of derivative immunity has evolved from this time-honored principle of judicial immunity. With the exception of the First Circuit, all Circuit Courts that have considered the doctrine of derivative immunity have upheld it for various reasons. Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976); Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965). The independence of the judiciary, one of the reasons underlying the doctrine of immunity, is the concern of the amicus curiae, State of Florida.

Amicus curiae submits that derivative immunity for a court-appointed guardian ad litem should also be maintained for his decisions in representing his ward on the theory that these functions are intimately associated with the judicial phase of certain civil process. Amicus curiae further submits that the doctrine of derivative immunity as applied to a court-appointed guardian ad litem, like judicial immunity, is equally necessary for the effective and independent administration of justice. Any derivative

immunity that court-appointed guardians enjoy exists for the benefit of the judicial system and of the public, not for that of the guardian. The ability of judges to appoint guardians for judicial proceedings is critical to the effective functioning of our adversarial judicial system.

The broad abolition of derivative immunity will erode the ability of the court to assure the independent administration of justice via court-appointed guardians who will no longer be willing to accept appointments due to the pervasive potential of personal liability under 42 U.S.C. §1983. Even the majority in Sparks, supra, acknowledged that:

> Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by §1983.

at 980. A total abolition of derivative immunity will subject all who may be appointed to assist in a judicial resolution of a dispute, even those cases

pursuing purely private claims, to possible civil rights liability in the federal forum at any time a dissatisfied opponent claimed a violation of a constitutional guarantee. Henceforth, anyone dissatisfied with state litigation can allege a conspiracy and thereby state a claim under 42 U.S.C. §1983.

Even assuming a qualified individual would accept an appointment as guardian absent derivative immunity, the threat of liability for damages in suits under 42 U.S.C. §1983 will deter the guardian from executing his duties with the decisiveness and judgment required for the benefit of the ward and the public. Furthermore, it would be unjust to subject a guardian to liability for exercising discretion which is required by virtue of his duties arising out of the judicial appointment. This rationale is the historical bases for official immunity and is equally applicable to guardians. See Scheuer v. Rhodes, 416 U.S. 232 at 240, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974), Butz v. Economou, supra. Attaining the

judicial system's adversary goal of complete and adequate representation requires the wide discretion in an appointee, which derivative immunity allows, without which judgment will be hampered by concern over potential personal liability under 42 U.S.C. §1983.

Furthermore, it can be readily seen that the broad abolition of derivative immunity will have the same undesirable effects on other court-appointed private persons, to-wit: translators, attorneys, special masters, receivers, etc. Absent such court appointees, who are intimately associated with the judicial process, the functions of the judiciary will be inhibited. Absent court appointees the judiciary will frequently be unable to properly formulate and implement its decisional functions. This negative impact arising out of the abolition of derivative immunity, particularly as it applies to court appointees, is not "comparatively insignificant" as concluded by the majority in Sparks, supra.

In light of these and other practical considerations, derivative immunity for court-appointed private persons is essential

to the effective functioning of our judicial system. Consequently, this Court should thoroughly explore the sound policy considerations behind such doctrine and the negative implications of its broad abolition. Amicus curiae submits that the broad abolition of derivative immunity will unduly encroach upon the effective and independent administration of justice.

Contrary to the majority opinion in Sparks, supra, derivative immunity serves a greater purpose than "keeping state judges off our witness stands." Sparks, supra, at 981. The purpose of the doctrine of derivative immunity is to promote the effective functioning of the judicial system and serves the additional purposes enunciated by the dissent in Sparks, supra. The dissent, citing Judge Sprecher in Sparkman v. McFarlin, 601 F.2d 261 at 267 (7th Cir. 1979), set forth the policy considerations supporting derivative immunity that the majority in Sparks abandons:

> The first is that frivolous civil rights actions should be discouraged. Second, the federal courts, under the guise of civil rights, should

not monitor and furnish a remedy for each losing party in every state court proceeding, particularly when the state merely furnishes the forum, has no interest in the outcome, and the state judge does no more that preside over a case presented to him by performing discretionary acts, judicial functions and the normal duties of his office. Third, private persons who are victims of, or witnesses to, a crime should not be discouraged from reporting the crime or from following the advice of a prosecuting attorney as to whether to lodge a formal complaint against, or to appear as a witness against, the perpetrator. Similarly, in civil matters, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before embarking upon activities of ambiguous legality. This is particularly important since it can be presumed that if the action is unconstitutional the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. Fourth, permitting conspiracies to be claimed which include immune judges may expose a judge to the time-consuming effort and chilling effect of submission to discovery and the appearance as a witness. Finally,

> if a judge condones a particular course of conduct, it seems manifestly unfair that the judicial expert should be immunized from attack but that the untutored lay person should be vulnerable to costly attack for participating in the same activity as the judge.

Moreover, amicus curiae submits that in the case of court-appointed guardians (and similarly appointed private persons) derivative immunity is essential because it serves the additional purpose of making available to the Court qualified individuals to serve as appointees, a necessary helping hand in achieving an objective, independent and adversarial judicial system.

CONCLUSION

Court-appointed guardians and other court appointees are intimately associated with the judicial process. They are essential to the effective functioning of our adversarial system. The broad abolition of derivative immunity will erode the Court's ability to make suitable court appointments to the detriment of our judicial system. Wherefore, amicus curiae requests this Honorable Court to reverse the Fifth

Circuit and reaffirm the doctrine of derivative immunity. In the alternative, amicus curiae requests that the doctrine of derivative immunity be affirmed at least in as far as it protects court appointees and particularly guardians ad litem.

Respectfully submitted,

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